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PERFORMING IN A RACIALLY HOSTILE ENVIRONMENT

PHOEBE WEAVER WILLIAMS*

I. RACIAL HARASSMENT OF BLACK ATHLETES: ANOTHER PARADIGM FOR UNDERSTANDING AFRICAN-AMERICANS' EXPERIENCES

As I was about to complete this article, I thought I should make it clear to the reader that I acknowledge that there are concerns about exploring this subject. In our society, athletes often receive more positive attention than many other persons who embark on worthwhile endeavors. Some consider athletes as well paid, often catered to, and too often recipients of considerable social deference. When informing some of my friends and relatives that I had decided to write about racial harassment of professional athletes, concerns were raised on more than one occasion that no one really sympathizes very much anymore with the "plight" of the Black professional athlete.¹

Should other readers share these concerns, I feel obliged to explain why I believe we should continue to care. Initially I should explain that I have chosen to focus on the problem of racial harassment of Black professional athletes.² Apart from the fact that I am African-American,

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1. Some commented that considering their contributions to society they were already overpaid, while others felt that too many Black athletes have forgotten "where they came from" and have neglected to "give something back" to Black communities. *See also The Black Athlete Revisited*, SPORTS ILLUSTRATED, Aug. 5, 1991, at 50 (reporting on a thoughtful exchange between ten prominent Black athletes: (1) Buck Williams, a forward for the Portland Trail Blazers remarked that "[p]layers are making a lot of money these days, but I don't think there is the commitment to reach back to their communities."; (2) Henry Aaron, all time home run leader and senior vice-president for the Atlanta Braves, agreed, stating that "[a] lot of black athletes, as soon as they reach a certain status, no longer associate with the black community."; (3) Willie Davis, Pro Football Hall of Fame defensive end and business executive, reacting to complaints about high salaries earned by black athletes remarked that what he hears from comments such as "'[y]ou know, we can't pay schoolteachers enough to teach these black kids, and yet they're paying the athletes this kind of money,' are a form of racism because people 'don't talk about white executives' making a lot of money.'" *Id.*

2. By focusing on professional athletes I do not intend to suggest that racial harassment is only a problem in the professional sports industry. On the contrary, news accounts demon-

there are other reasons for my decision. There exists a rich history, along with numerous autobiographical and news accounts, that chronicle the experiences of Black athletes. By focusing on their experiences, I do not mean to suggest that other "outsider" groups have not experienced similar hostilities. On the contrary, as members of immigrant groups, ethnic groups, and persons of different religions entered professional sports, they also encountered racial, ethnic, and religious harassment.³

strate that racial taunts present problems for college and high school sports programs. (1) *college sports*: see, e.g., Mike DeCourcy, *Out of Bounds, Tiger fans racially taunted his players, at the Pyramid, UAB's Bartow complains*, COMM. APP., Jan. 26, 1996, at 1A (noting complaints by Bartow, Coach of the University of Alabama-Birmingham's mens basketball team, that students seated behind their bench at the University of Memphis game made racial remarks against three of his players; noting also complaints by Long Beach State coach Seth Greenberg that he heard a racial comment from a student seated near his team's bench in a game at New Mexico State and was affronted that night by an anti-Semitic remark scrawled on the marker board in his team's locker room); NELSON GEORGE, *ELEVATING THE GAME: BLACK MEN AND BASKETBALL* 212 (1992) (describing how Patrick Ewing was a "chief target" for racist fans while playing basketball for Georgetown University:

During the 1982-83 season students at Providence College held up 'Ewing Can't Read' signs. At the Meadowlands Seton Hall supporters unfurled a banner that read, 'Think! Ewing! Think!' while in Philadelphia Villanova fans wrote 'Ewing Is a Ape' on placards. T-shirts were sold at the Big East schools declaring, 'Ewing Kan't Read Dis.' Several Georgetown games were interrupted by bananas thrown on the floor. Twice during the 1982-1983 campaign the Hoyas and chief rival St. John's engaged in fistfights partially attributable to the Big East's ultraphysical style—a style Thompson's team helped inspire—as well as the racial slurs from St. John's student body. Far too many of the school's white working-class Catholic student body used Ewing as a sounding board for their own latent racist attitudes. I am a St. John's alumnus, and I saw and heard things from them that brought dishonor on the school. 'Ignorance has no color,' Thompson told *Time*. 'The point isn't that this season has been degrading to a black man, it has been degrading to any man. On the airplane last week I asked Pat again how he was holding up. He told me, 'I've grown accustomed to it. I got so much of it in high school.' That made me saddest of all.)

(2) *high school sports*: see, e.g., Candy Hamilton, *Where a Tomahawk Chop Feels Like a Slur*, CHRIST. SCIENCE MONITOR, Oct. 25, 1995, at 3 (discussing derisive caricatures, gestures, and taunts made at nearly every competition between Pine Reservation Native American athletes and whites; noting that in 1994 the South Dakota High School Activities Association adopted policies on racial taunting after slurs directed at a Black player caused a melee at a Black Hills football game). Also, racial harassment from fans is not only a problem for athletes but also for coaches as well. See, e.g., *Racial Taunts At Drake Coach?*, SPORTING NEWS, Feb. 25, 1991, at 15 (noting that Drake Coach Rudy Washington, founder of the Black Coaches Association, stated that he had been subjected to racial slurs repeatedly by fans at Indiana State, Southern Illinois, and Southwest Missouri State); GEORGE, *supra* note 2, at 209 (noting that in response to Thompson's benching of Georgetown's top scorer, Jonathan Smith, and after the loss of six straight games, during the 1974-1975 season "some white students unfurled a banner at a home game that read, 'Thompson, the Nigger Flop, Must Go!'").

3. JACKIE ROBINSON, *I NEVER HAD IT MADE* 62 (1995) (describing how the manager of the Philadelphia Phillies, Ben Chapman, admitted that his team used ethnic slurs against DiMaggio and Whitey Kurowski as their style of baseball).

However, these individuals eventually blended into the sports terrain so that their unique ethnicity often went unnoticed. Athletes of color, however, have remained visible targets for racial derision.

In particular, I have focused on roles that sports fans or spectators play in creating racially hostile working environments for Black professional athletes. I have chosen to focus on fans because, while a number of constituencies have perpetrated racially hostile working environments for Black athletes, insufficient attention has been given to solving the problem of fans creating racially hostile environments.⁴ The legal literature is virtually devoid of academic commentary focusing on this problem.

The fact that Black athletes remain targets of racial abuse from sports fans is perhaps another one of America's racial dilemmas. As a group, Black professional athletes conform to the American meritocratic model. Their successes allegedly affirm the fairness and equality of the American system. They have not only played their sports well, they have excelled at America's game. Their successes "fax" to us America's message: if you are truly talented, work hard, have something of value to offer, and function from an "individualistic" rather than victim perspective, our society will reward you in a "colorblind" fashion.⁵ Frustra-

4. For accounts of racially harassing behaviors by other constituencies such as: (1) *opponents*: see ARTHUR ASHE, *A HARD ROAD TO GLORY* 109 (1988) (describing the experiences of Black Drake University running back, Johnny Bright, who during an October 1951 game was knocked unconscious three times by white Oklahoma linemen, but nevertheless the Missouri Valley Conference officials refused to investigate the matter); ROBINSON, *supra* note 3, at 50, 59-62 (describing black cat thrown into the dugout by a Syracuse team and racial insults from the Philadelphia Phillies that were led by Ben Chapman, who had also been accused of shouting anti-Semitic remarks at the Yankees fans); JULES TYGIEL, *BASEBALL'S GREAT EXPERIMENT* 309 (1983) (noting that Jackie Robinson and Willie Mays received more than their share of "beanballs"; explaining that shin guards may have been invented by two of the earliest Black players in the International League during the later part of the nineteenth century to keep at bay opponents who deliberately tried to drive their spikes into them); (2) *management*: see CURT FLOOD, *THE WAY IT IS* 69-70 (1971) (describing racial epithet related by Solly Hemus during a team meeting); MIKE BASS, *MARGE SCHOTT: UNLEASHED* 239-252 (1993) (chronicling the scandal that emerged after a number of individuals asserted that they heard Marge Schott make racist statements against Blacks and Japanese, anti-Semitic statements against Jews, and pro-Hitler remarks); (3) *media*: see Timothy Davis, *The Myth of the Super-spade: The Persistence of Racism in College Athletics*, 22 *FORDHAM URB. L.J.* 648-650 (1995) (discussing how the media reinforces and perpetuates stereotypical images of Black athletes as having only superior physical instead of intellectual capabilities); GEORGE, *supra* note 2, at 224 (attributing to "black racism" during the eighties the labelling of the Celtics as "a white boy's team").

5. There have been other harbingers of this message: SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 29-30 (1990) (proposing that Blacks develop identity based on individual acceptances of personal responsibility rather than on limitations associated with racial iden-

tions surface when Blacks observe that professional athletes and others who have mastered the game are still objects of racial scorn.⁶ Another message emerges: no matter what the accomplishment, no matter how appropriate the deportment, for some, African-Americans will remain an objects of racial hostility.

My own frustrations surfaced after reading an article about the fire-bombing of a church in Knoxville, Tennessee. At the time this article was brought to my attention, I had purchased my green and gold "Miracle Man No. 92" t-shirt. Like the rest of the "cheeseheads" in Wisconsin, I was anticipating and awaiting a Green Bay Packer trip to Superbowl XXX, which would come after the victory that weekend over the Dallas Cowboys. As the game approached, I looked forward to putting aside for a few hours the inevitable despair that accompanied this research. My plans for escape were marred after I learned that Reggie White, a defensive lineman for the Packers, is an associate minister of the church at issue. I knew that during the upcoming game I would filter White's performances through the prism of experiences of other African-American athletes who have had to perform at the height of their careers while coping with the severe emotional pain that results from racial violence.⁷

From all accounts, it appears that the church bombing was motivated by racial animosity.⁸ Further, while I admit the speculative nature of this contention, it at least appears this violence may have been a deliberately timed attempt to impact White's performance during the Packer playoff

tity). *But see*, Jeffrey T. Sammons, *Rebel with a Cause: Muhammad Ali as Sixties Protest Symbol*, in MUHAMMAD ALI, THE PEOPLES CHAMP 158 (Elliott J. Gorn ed. 1995) (discussing how "New Blacks" no longer accept that "American" premise); *c.f.* JOEL KOTKIN, TRIBES 34 (1992) (explaining that "group survival, particular in dispersion, relies on . . . group self-help, a strong ethnic sense of identity and a powerful ethos of self-preservation").

6. For an account of the frustrations of African-Americans who have "made it" *see generally* ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993).

7. I am clearly not the first to relate victories and defeats of African-American athletes to the African-American experience in the United States. *See* ALLEN GUTTMANN, SPORTS SPECTATORS 119 (1986) (describing how Jack Johnson became a folk hero after defeating James Jeffries, the "Great White Hope"; in North Carolina Blacks sang to the tune of "Amazing Grace," "Amaze an' Grace, how sweet it sounds, Jack Johnson knocked Jim Jeffries down"; after Joe Louis lost to Schmeling, Lena Horne stated: "Joe was one invincible Negro, the one who stood up to the white man and beat him down with his fists. . . . But this night he was just another Negro getting beaten by a white man.").

8. Dale Hoffman, *White Tackles Hatred Head On*, MILW. J. SENT., Jan. 12, 1996, at A1, A16 (interviewing White about his reactions to the Monday night firebombing of the Baptist church in Knoxville, Tennessee where he is an associate pastor; reporting about White's frustration as he approaches the most important game of his career; noting that "racial graffiti was spray-painted on the back door of the church," and paraphernalia discovered pledging to fight against interracial churches, integrated schools, and organizations).

game. Prior to the NFC playoff game in San Francisco against the 49ers, Packers' security personnel were informed that a telephone warning had been received which stated that Reggie White's Baptist church would be burned down.⁹ The Packers did not "brief" White about this problem until after the game or until after the bombing. The fire-bombing occurred three days after the telephone threat.¹⁰ White and his teammates were required to prepare for the playoffs against the Dallas Cowboys during the wake of investigations about racial violence. White expressed frustration that "the country isn't taking this kind of thing seriously enough."¹¹ While he was confident that he could block these events out of his mind and not allow them to interfere with his ability to play in the upcoming game, I wondered why, after all these years, he must perform under these circumstances.

Verbal racial abuse and actual racial violence present some complex issues for sports industry employers. To what extent were the Packers required to address racial harassment from unknown parties against their employee? What reasonable measures should sports' employers adopt to prevent and address this type of racial harassment? In Part II, I describe how sports spectators and fans have played a role in creating racially hostile environments for African-American athletes. What reasonable reactions should the Packers expect from White? In Part III, I discuss Title VII of the Civil Rights Act and the legal requirements the Act imposes upon employers, and in Part IV, I contrast the traditional responses of the sports' industry to racial abuse. While White clearly indicated that he would not allow these events to affect his play, what if he had refused to play, or felt unable to play due to the emotional pain resulting from these events? What if he misdirected his frustration while on the field towards the opposing team? Should his play under these circumstances influence whether the NFL fines or sanctions his behavior? I do not plan to specifically address these hypotheses. Their resolution would require consideration of a number of facts and circumstances. I do raise them so that the complexity of the problem of racial harassment in the sports industry may be better appreciated.

9. Joe Williams, *Warning Preceded Arson*, MILW. J. SENT., Jan. 12, 1996, at A1, A16 (reporting that Jerry Parrins, the corporate security officer for the Packers, stated that the Packers were warned of the bombing).

10. *Id.* at A1.

11. *Id.* at A16 (also expressing frustration over the lack of solving the murder of his stepfather four years earlier and letters stating that the police and fire department were working with the perpetrators of violence).

Some may consider White's experiences as unique, isolated occurrences. Unfortunately, the history of Black athletes in interracial athletics suggests that they are not. It is against this historical backdrop that we must measure the extent we have progressed in providing an environment free from workplace racial harassment. It is against this backdrop that we should measure contemporary experiences of racial harassment and consider whether the sports industry has done enough to address this problem. In Part V, I conclude that the industry can do more.

When seeking social reforms, African-Americans are reminded that our society rewards merit and excellence. Yet, the experiences of Black athletes, whose merits are meticulously, statistically, and publicly documented,¹² undermine arguments that merit alone rather than race matters in our society.¹³ If Black athletes still experience racism, what of other African-Americans whose meritorious performances are not so quantifiable, not so public, and not so clearly extraordinary? If the wealth, the performances, and the economic value African-American athletes bring to our economy do not shield them from racism, then what will shield the rest of us?

II. THE ROLES FANS PLAY IN CREATING A HOSTILE WORKING ENVIRONMENT FOR PROFESSIONAL ATHLETES

Despite cheers and adulation, fans or spectators have historically played significant roles in creating racially hostile environments for athletes of color. Initially, racial partisanship intensified the emotions of fans to such an extent that when the Black prize fighter, Jack Johnson, faced his white opponent, James Jeffries, on July 4, 1910 in Reno, Ne-

12. Lawrence M. Kahn, *Discrimination in Professional Sports: A Survey of the Literature*, 45 IND. & LAB. REV. REV. 395-96 (1991) (concluding that because sports data is extensive and publicly available researchers work at a particular advantage when measuring productivity and determining the possibility of discrimination).

13. See generally CORNEL WEST, *RACE MATTERS* preface (1993) (Professor West expressed how his personal anger and frustration emerged because he was refused service by nine taxi's while in New York; for him that incident conjured up recollections of ugly racial memories—being stopped on fake charges of trafficking cocaine—being stopped for driving too slowly on a street where the speed limit was twenty-five miles per hour); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 16, 17 (1994) (explaining how “discriminatory incidents are freighted with centuries of racial oppression of which the black victims are consciously or unconsciously aware” and that a sharing of these experiences among family and friends creates a “domino effect of anguish and anger rippling across an extended group”; reasoning that “[i]ndividual black Americans soon come to see that no amount of hard work or achieved status can protect them from racial oppression across numerous institutional arenas of this society”).

vada, spectators were required to check their guns at the gate.¹⁴ While this early precaution was perhaps one of the first industry responses to potential racial violence and harassment, the fight's promoters could have done more. They could have stopped the band from playing "All Coons Look Alike to Me," a song that only fueled the spectators propensity to greet Johnson with racial slurs.¹⁵

One might relegate Johnson's experiences to those consistent with racial attitudes of an earlier era—an era when Blacks were often excluded from interracial competition. However, even after penetrating exclusionary barriers to participation, African-Americans were still subjected to racial harassment. Most people know of the racial harassment inflicted upon Jackie Robinson, who during the late 1940s became the first African-American to participate in organized interracial major league baseball competition. Three decades after Johnson, Robinson had to endure racial abuse that was so virulent that his perseverance under these circumstances contributed to the iconic stature he now occupies in history.¹⁶ Again, Robinson's early experiences may be explained as occurrences that were part of the overall pre-Civil Rights era milieu. Yet even after periods of racial progress and improvement in racial relations, there were still the well known and documented experiences of Hank Aaron during the early seventies. During the two years before establishing a new home run record, Aaron received hate mail from fans of Babe Ruth and threats of racial violence directed against himself and members of his family.¹⁷ While racial harassment of athletes by fans may be on the decline, a 1991 survey of professional athletes indicates

14. GUTTMANN, *supra* note 7, at 119 (noting also how racial partisanship intensified the emotions of the fans to such an extent that after Johnson's triumph, there were race riots though the country resulting primarily in murders and injuries of blacks who were assaulted by whites and some whites who were assaulted by blacks).

15. *Id.*

16. Douglas Martin, *History of Brooklyn, Inning by Inning*, N.Y. TIMES, Jan. 5, 1996, at B1, B9 (describing an interactive exhibition, "Play Ball," at the Brooklyn Historical Society which invites visitors to experience what it must have been like for Robinson by having them stand on a plate and grab a bat while hearing the sounds of a roaring crowd with break through voices yelling, "Hey there, big boy," and "What you doin' out there on a white man's field?")(I am indebted to my colleague, Professor Michael Waxman, for bringing this article to my attention). See also ROBINSON, *supra* note 3, at 51 (describing fan hostility while playing in the minor leagues at Louisville as a "torrent of mass hatred from a vicious howling mob that yelled racial remarks).

17. HENRY AARON, IF I HAD A HAMMER 230-238 (1991)(discussing and offering examples of the type of hate mail he received). After publicity about these letters reached the public, Aaron received thousands of letters of encouragement. *Id.* at 242.

that thirty-six percent of responding athletes reported having heard racial slurs from whites during games.¹⁸

During the civil rights era, discrimination against African-Americans became a public issue, and as a result, many expressions of racial animosities were driven underground. Generally, racial bigotry was demonstrated through more subtle behaviors.¹⁹ However, the social controls that ordinarily deterred overt and blatant expressions of racial animosity remained absent from the "workplaces" of professional athletes.²⁰ Unlike most employment work areas, the athlete's workplace was often a public arena or stadium. Crowds at sporting events produced a type of anonymity for sports customers.²¹ Frequently, alcohol was available and consumed by some fans in large quantities.²² Boisterous or loud behavior became part of the overall milieu that customers

18. Williams Oscar Johnson, *A Matter of Black and White*, SPORTS ILLUS., Aug. 5, 1991, at 44 (expressing confidence that the responses to a questionnaire did reflect the thinking of those athletes who participated but noting that due to the low response rate the results did not represent a meaningful statistical measurement of the view of all professional athletes; explaining further how the professional leagues discouraged athletes from participating in the survey).

19. Thomas F. Pettigrew, *New Patterns of Prejudice: The Different Worlds of 1984 and 1964*, in RACE AND ETHNIC CONFLICT 53-58 (Pincus and Ehrlich eds. 1994) (Developing a thesis based on an extensive body of social psychological research which concludes that severe individual and institutional racism persists, but is "far more subtle, indirect, and ostensibly nonracial," and identifying six features of modern antiblack prejudice:

(1) rejection of gross stereotypes and blatant discrimination; (2) normative compliance without internalization of new behavioral norms of racial acceptance; (3) emotional ambivalence toward black people that stems from early childhood socialization and a sense that blacks are currently violating traditional American values; (4) indirect 'micro-aggressions' against blacks which is expressed in avoidances of face-to-face interaction with blacks and opposition to racial change for ostensibly nonracial reasons; (5) a sense of subjective threat from racial change; and (6) individualistic conceptions of how opportunity and social stratification operate in American society.

Id. at 54.

20. See generally Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, in RACE AND ETHNIC CONFLICT, *supra* note 19, at 98-99 (explaining that most workplaces, along with the middle class status of workers, provide some protection against certain categories of discrimination; but this protection weakens when a black person moves from those work settings to large stores and restaurants where contacts are mainly with white strangers).

21. Cf. *id.* at 99 (describing the spatial dimension of discrimination which increases the probability of Blacks and women experiencing racial hostility in unprotected public places such as streets; noting that research has described women and Blacks as "open persons," i.e. particularly vulnerable targets for harassment that violates rules of public courtesy).

22. Tim Layden, *The 'Vulgar Minority'; Fueled by alcohol, as well as anger and aggression, a few fans make it uncomfortable for many*, NEWSDAY, Feb. 12, 1989, at Sports 9 (concluding that most alcohol is consumed by a minority of the fans attending sporting events).

expected to enjoy.²³ Recognizing the emotional outlet that sporting events provided their customers, management condoned and encouraged certain forms of aggressive spectator behavior. Within this context, control of fan behavior in general, particularly racially abusive behaviors, was often difficult to achieve.²⁴

While there have been some lapses, the United States' sports industry has routinely managed to control levels of fan aggression.²⁵ Public arenas have employed security staffs whose duties include prevention of fan behavior that interrupts the event, protection of athletes, and protection of spectators. Nevertheless, fans generally have not been sanctioned for verbal racial abuse, and this lack of action has accounted in part for the hostile environment experienced by African-American athletes.²⁶

Referring to his early years while playing in the minor leagues at two North Carolina communities, Curt Flood, a Black professional baseball player, recalled as one of his "first and most enduring memories" the verbal racial abuse perpetrated by drunken white fans.²⁷ For Flood, these incidents were not confined to his early years of competition. During the late sixties, Flood reflected on the hypocrisy of team owners who

23. *Id.* (observing that "[t]here are few places in a civilized society where a person can drink to inebriation, curse publicly and get into a fight . . . and hope to escape prosecution. Sporting events are one such place.").

24. Mark Gaughan and Vic Carucci, *More Security This Time Against Miami League Says It Will Be Monitoring Big Game at Rich Stadium Closely*, BUFFALO NEWS, Oct. 6, 1994, at D2 (interviewing Bill Bambach, the Bill's director of security, who indicated that the NFL had met with the Bills and recommended increased security measures; reporting that Charlie Jackson, the head of NFL security, would attend the game at Rich Stadium; observing that the league cannot control the cheering of 80,000 fans in a stadium; nevertheless Bambach offered assurances that "[i]f fans get to the point where they get obnoxious or start making racial remarks, they're going to get ejected or arrested.").

25. GUTTMANN, *supra* note 7, at 162, 164 (comparing spectator hooliganism in the United States with that abroad and noting that one scholar determined that there had been 312 riots in the U.S. between 1960 and 1972; attributing the irenic atmosphere of most sports events to the institutions of social control such as ticket-takers and policemen and a behavioral code internalized by the majority of modern fans that accepts cheering and jeering but not physical injury).

26. *E.g.*, Affidavit dated Jan. 21, 1994 of Vincent A. Tobia, legal counsel for the Buffalo Bills football team describing the type of security provided at Rich Stadium; stating that fans "who use inappropriate language or act in an inappropriate manner are asked to leave" the stadium and that on the day of the Dolphin game, there were 36 ejections of fans from the stadium; however, "there has never been an ejection from Rich Stadium for racial slurs" (copy on file with Marquette Sports Law Journal).

27. FLOOD, *supra* note 4, at 37-38 (recalling one drunken white fan in particular who made sure that he provided an appropriate example for his four boys who attended the game with him by checking the boys reactions when he yelled racial epithets to Flood; remarking that it did not matter whether they played at home or away in that league, the "stadiums resounded with 'nigger,' 'eight-ball,' 'jigaboo,' and other pleasantries").

professed goals of decision making for the "good of the game," but who nevertheless polluted the sport of baseball with racial abuse by actively encouraging unruly, drunken, and obscene fans.²⁸ Flood's experiences included fans who not only hurled racial epithets, but also pelted him with "groceries" and "flashlight batteries."²⁹

More recent accounts of fan abuse suggest that despite the passage of time, fans continue to subject athletes to racially abusive behaviors. During September 1993, Bryan Cox, a professional football player with the Miami Dolphins, was subjected to "an intense barrage of verbal abuse"³⁰ from several fans attending the game between Miami and Buffalo. This abuse might have gone unnoted but for Cox's response to this scene. At the beginning and during the game, Cox directed two "obscene gestures" towards the Buffalo fans. For these acts, Cox was fined \$10,000 by the National Football League (NFL). Cox appealed the fine, and while awaiting the decision he filed a ground-breaking complaint with the Equal Employment Opportunity Commission alleging that the NFL had subjected him to a racially hostile environment. Upon the issuance of a "right to sue" letter, Cox filed an action in the federal court. The NFL reduced his fine to \$3,000 and "distributed revised guidelines requiring, among other things, that teams remove from the stadiums fans who take part in 'racial taunts.'"³¹

While the merits of Cox's complaint of a racially hostile environment were not addressed during the federal court litigation, a review of the affidavits of Cox and his teammates suggests that there was strong evidence that Cox was subjected to a racially abusive environment. Some of the Buffalo fans began their harassment with Cox's arrival for the pre-game warm-up at 11:30 a.m. This harassment continued for one and

28. *Id.* at 57 (offering as an example of the owners cheerful attitude towards hoodlum behavior by fans in the bleachers and the grandstands, the encouragement by the Chicago Cubs during 1969 of drunk and unruly fans known as the "Bleacher Bums").

29. *Id.* at 57 (remarking that each time he took his position in center field he was saluted with "brays of 'black bastard' and 'faggot'").

30. *Cox v. National Football League*, 889 F. Supp. 118, 119 (S.D.N.Y. 1995) (reciting claims by Cox that he was subjected to an "intense barrage of verbal abuse, much of which was based on race" and which included "[s]houts of 'nigger,' 'monkey,' 'we will kill you,' and a string of racially-based obscenities"; noting that "one fan had rigged up a black dummy with Bryan's number and the words 'wanted dead' on it, and then hung the dummy on a noose").

31. *Id.* (The impetus for the revision of the guidelines was an issue in dispute between the parties with the N.F.L. asserting that they had begun "the process of revising its guidelines soon after it learned of the racial taunts at the January 25 hearing" on Cox's appeal of his fine).

one-half hours before the game and persisted throughout the game.³² In addition to the racial slurs and epithets, "numerous fans [made] obscene gestures with their hands" towards Cox.³³ Others yelled verbal threats, such as "we will kill you."³⁴ As if the verbal taunts and threats were not enough, one fan held up a dummy in "blackface" with Cox's number on it. While it was not clear that Cox saw this dummy, the message it sent was clear. Across the chest of the dummy were written the words "Wanted 51 Dead." Tied around the dummy's neck was a noose.

Lynchings in effigy are meant to arouse the type of "demonic terror"³⁵ white Klansmen inflicted on Blacks decades earlier.³⁶ The parallel between a "lynching" symbol hoisted in the midst of jeering crowds screaming racial epithets for victory and the scenes of lynch mobs is remarkable. When white fans play these "race cards," African-Americans are reminded of the fragility of their freedoms. Memories are recalled

32. Affidavit dated Oct. 22, 1993 of Stuart B. Weinstein, Security Investigator hired by the Miami Dolphins who accompanied Cox onto the football field prior to the pre-game warm-ups for the football game against the Buffalo Bills in Buffalo, New York on Sept. 26, 1993 (copy on file with Marquette Sports Law Journal).

33. Affidavit dated Oct. 18, 1993 by Louis Oliver, a professional player employed by the Miami Dolphins who was present during the pre-game warm-ups for the game between the Bills and the Dolphins on September 26, 1993 (copy on file with Marquette Sports Law Journal).

34. Affidavit of Troy Vincent, a professional football player with the Miami Dolphins who was present during the pre-game and warm-ups for the Sept. 26, 1993 game between the Bills and the Dolphins (copy on file with Marquette Sports Law Journal).

35. JAMES CAMERON, *A TIME OF TERROR* 106, 108 (1994). Cameron, a Black man, survived a lynching attempt during 1930 in Indiana. He describes what he calls the "demonic terror" created by the white mobs of men, women, and children who lynched two of his companions and just stopped short of lynching him. His descriptions of those lynchings eerily parallel the spectacles created by racially abusive sports fans: "As far as I could see, white faces with open mouths screaming for blood, Black blood, were whooping it up—yelling for my blood. A victory spirit was in the air." He recalled that when some of the mob broke into the jail, the crowd outside "seemed to yell its approval. They stomped their feet, chanting the way crowds do at a football game for their favorite athlete: 'We want Cameron! We want Cameron! We want Cameron!'"

36. The courts have generally recognized the chilling images that Ku Klux Klan and lynching symbols present to African Americans. *See, e.g., Daniels v. Essex Group, Inc.*, 740 F. Supp. 553, 560 (D.C. Ind. 1990) (commenting that: "The most violent threats to black society are well known to come from that organization [the KKK]. Furthermore, there is no more chilling image than that of a black man being hung by the KKK."); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991) (reasoning that the Ku Klux Klan's effect on Blacks is such that only one isolated instance of harassment would be enough to establish the existence of a hostile work environment); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (concluding that a Black woman's repeated experiences of finding a piece of cord over her work station that was fashioned like a noose was sufficient to alter her working conditions).

about how political compromises, economic exploitation, or even social "mood swings" provided sufficient justifications for whites to deny African-Americans equal freedoms.³⁷ Within the context of sporting events, Black athletes are not the only ones harassed. Black fans are similarly reminded that large white crowds filled with persons consuming alcohol may turn "ugly."³⁸ When white fans are permitted to engage in racially opprobrious conduct towards Black athletes, Black fans are likewise subjected to a racially abusive environment. Ironically, it is an environment for which they have paid to enter.

Threats of racial violence against Black athletes from fans have not been isolated occurrences. Rather, such threats have peppered the careers of athletes performing in a variety of interracial competitions.³⁹ For some fans, racial harassment becomes one of the arsenal of weapons used to affect a positive outcome for their team.⁴⁰ Where racial harassment is used by sports customers as part of a strategy to support their team, one might argue that harassment under these circumstances is simply part of the game. Racism and nationalism have been identified as one of the causes of fan hooliganism at international sporting events.⁴¹ Racially hostile behavior by American sports fans is simply part of the overall deterioration of behavior by sports customers.⁴²

37. Cf. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 158-194 (1992) (Through the use of science fiction, Bell chronicles how the American public, if offered the proper incentive, could amend the United States Constitution and enact legislation that would strip black Americans of existing protections and permit black enslavement by aliens).

38. ROBINSON, *supra* note 3, at 59 (recalling his feelings about his wife having to sit in the "midst of hostile spectators" who started screaming racial insults that were taken up by the crowd).

39. ASHE, *supra* note 4, at 39 (discussing a threat received by Willie Stargell from a white fan who threatened to "blow his brains out" if he played in a baseball game; noting the experiences of Charlie Sifford, a black golfer who during the 1960 Greater Greensborough Open was harassed by five white men who followed him around the course, threw beer cans, jumped up and down and yelled racial epithets while he attempted to concentrate on a shot (*Id.* at 151); noting also that during the 1967 LPGA tour, Renee Powell, the first Black woman to participate in the tour received racial slurs, hate mail, and threatening letters (*Id.* at 153)).

40. Layden, *supra* note 22, at Sports 9 (describing the "my team" syndrome as a phenomena where fans no longer just witness a team's success or failure but feel that they influence it; also known as the "homecourt" advantage).

41. Phil Hersh, *Soccer Hooliganism Still Plagues Europe*, CHI. TRIB., June 12, 1988, at P1 (reporting about incidents of fan violence at soccer games in Paris and Argentina that stemmed from hard-core hooligans with a "right-wing orientation" against black stars of opposing teams).

42. Layden, *supra* note 22, at 9 (discussing the extent that obscene language, fighting, and beer abuse by a significant minority of sports fans alter the demographics of audiences; observing that during the last two decades there has been an increase in fan violence; chronicling major incidents of fans misbehavior, which have included: (1.) spilling onto the field at Cleve-

Explanations that tend to rationalize, objectify, or justify racially harassing behaviors generally are not effective defenses to claims of a racially hostile work environment under Title VII. Under existing legal paradigms, employers may be sanctioned for permitting race harassment; even harassment which stems from non race based motivations, i.e., the desire to distract an opponent during a game; or harassment from third parties such as customers.

While Cox's complaint represented the first instance where the legal protections provided by Title VII of the Civil Rights Act of 1964 were used to address the racial harassment of Black athletes, the following discussion establishes that sports industry employers, like other employers, are obliged to address racially hostile work environments. Yet, it appears that the industry has only recently taken measures to address this problem. Whether these measures are reasonable is a subject worthy of discussion because for some African-Americans the response of the sports industry to racism becomes a metaphor for the extent the rest of society is willing to provide racial justice.⁴³

III. LEGAL PARADIGMS FOR IDENTIFYING AND ADDRESSING RACIALLY HOSTILE WORK ENVIRONMENTS

Title VII of the Civil Rights Act of 1964 forbids discrimination in employment because of an individual's race. This prohibition extends not only to discriminatory treatment that has economic consequences, but also to discrimination that affects non-economic terms and conditions of employment, e.g., the psychological and emotional environment present in the workplace.⁴⁴ While Congress, when articulating the Act's prohibitions, did not explicitly mention racial harassment or hostile work

land Municipal Stadium, June 4, 1974; (2.) rioting and overturning several cars at Tiger Stadium in Detroit, Oct. 15, 1984; (3.) after concessionaires accidentally serve full-potency beer instead of the low alcohol variety at Sullivan Stadium and the Patriots clinch a playoff berth, riotous fans tear down the goalpost and while carrying it shock themselves when they touch a high-tension wire, Dec., 22, 1985; (4.) vandalism and destruction of the playing field, Shea Stadium, Sept. 17, 1986; (5.) throwing debris onto the field, Riverfront Stadium, April 30, 1988; (6.) hurling bottles at opposing teams at Candlestick Park, Aug. 10, 1988; (7.) setting fires in the stands at Giants Stadium, Oct. 17, 1988; and (8.) confronting a referee on the ice during a hockey game at Boston Garden, Jan. 28, 1989).

43. For a discussion of sports as a metaphor for racism encountered by African Americans see Davis, *supra* note 4, at 618 (proposing that "college sport serves as a metaphor for the racism encountered by African-Americans in our society").

44. In *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), the Fifth Circuit, the first court to interpret Title VII as covering hostile environment claims, recognized that "today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discrimination are no longer confined to bread and butter issues."

environments, courts have consistently recognized that racially abusive work environments may violate the statute.⁴⁵ The harassment must be "sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment.'"⁴⁶ Where the employer does not commit the harassment, there must be a basis for finding the employer liable for the harassing conduct of third parties, e.g., co-workers and customers.⁴⁷

Recognizing that employees may be subjected to a variety of emotionally abusive behaviors in the workplace, courts have distinguished actionable racial harassment from general harassment by articulating specific criteria. For harassment to violate Title VII, it must be either "racial" harassment or stem from racial "animus."⁴⁸ Once the character or motivations for the harassment are demonstrated, the harassment must be "pervasive or severe enough to alter the terms, conditions, or privilege of employment." Of course what is abusive to some workers may be considered part of the routine for others. Therefore, when determining whether the conduct meets a requisite level of severity, courts have applied an objective as well as a subjective standard for scrutinizing the work environment.⁴⁹ Further, the employee bringing the action has the burden of proving the existence of each of these criteria.⁵⁰

The Equal Employment Opportunity Commission, the federal agency designated to enforce Title VII, articulates an objective standard that considers "whether a reasonable person in the same or similar cir-

45. The Supreme Court in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986), recognized that hostile environment claims based on race, ethnicity, and gender are actionable under Title VII.

46. *Id.* at 67.

47. *Bolden v. PRC Inc.*, 43 F.3d 545 (10th Cir. 1994) (setting forth three sources of liability for an employer where the harassment stems from coworkers and not the company directly or its supervisors: (1) the harassment was within the scope of the coworkers' employment; (2) the employer either negligently or recklessly refused to recognize or deal with the harassment; and (3) the harassing coworkers acted under apparent authority provided by the employer).

48. *C.f. Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (concluding that "predicate acts underlying a sexual harassment claim need not be clearly sexual in nature"; "any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment").

49. *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (rejecting a multi-factor test for evaluating Title VII harassment claims and instead evaluating claims against both an objective and subjective standard).

50. Plaintiffs in racial harassment cases have the same burden as those in other types of racial discrimination cases. Plaintiffs have the burden of establishing and proving by the preponderance of the evidence each element of their racial harassment claim. *Johnson v. Teamsters Local Union No. 559*, 1995 WL 355304 (D. Mass. 1995).

cumstances would find the challenged conduct intimidating, hostile or abusive.”⁵¹ Recently courts have considered the perspective of the victim of harassment rather than adopting reasonableness standards devoid of the contextual experiences of the particular plaintiff.⁵² Some courts are willing to avoid having the white experience become the standard against which Black reaction should be appropriately measured. Rather, courts have considered:

the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers and supervisors, the totality of the physical environment of the plaintiff’s work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff’s introduction into its environs, coupled with the reasonable expectations of the plaintiff upon voluntarily entering that environment.⁵³

When evaluating the severity of the harassment, some courts have required demonstration of the existence of a pattern of racial insults and/or harassment. These courts ignore the reality that some behaviors even in isolation are so destructive of psychological well being that plaintiffs should not have to demonstrate patterns of behavior. When courts structure their reasoning around a quantitative instead of qualitative assessment of harassment in the work environment, they succumb to a false dichotomy often creating a two part taxonomy for harassing behaviors. Such behaviors are either characterized as involving only “isolated incidents” or “sporadic racial slurs,” e.g., non actionable harassment,⁵⁴ or characterized as “pervasive” because of evidence of a “steady barrage of opprobrious racial comments,” i.e., actionable harassment.⁵⁵

51. 58 Fed. Reg. 51,266, 51,267 (1993).

52. See, e.g., *Johnson v. Teamsters Local Union No. 559*, 1995 WL 355304, at *4 (D.Mass. 1995) (concluding that the harassment was severe and pervasive and commenting that “when considering the graffiti and the taunting, the Court believes that *any reasonable black person* in Johnson’s situation would have found the work environment hostile or abusive”)(emphasis added); *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (assessing a sexually harassing environment from the perspective of the reasonable woman); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me. 1991)(“question of whether conduct and speech rises to the level of harassment, putting aside the question of the employer’s knowledge, must be considered only from the employee/victim’s perspective”).

53. *Rodgers*, 12 F.3d at 674 (citing *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991)).

54. *Snell v. Suffolk Co.*, 782 F.2d 1094, 1103 (2d Cir. 1986) (defining actionable harassment as “more than a few isolated incidents of racial enmity”); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987)(same).

55. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981) (requiring a steady barrage of opprobrious racial comments); *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) (considering coworkers threat to plaintiff, “you better be careful because we know peo-

Other courts have declined to consider the severity of harassment along the single dimension of the frequency of events.⁵⁶ The Seventh Circuit, for example, has recently explained that when examining the "totality of the circumstances," courts should give proper weight to the "cumulative weight" of several "isolated" racial comments.⁵⁷ Agreeing with the reasoning of an opinion of the District Court of Florida, the Seventh Circuit reasoned that a "holistic perspective," which acknowledges that "separate incidents may accumulate, and that the work environment created . . . may exceed the sum of the individual episodes," may be more appropriate than a simple quantitative assessment of harassing behaviors.⁵⁸

Under a subjective standard, a court will give proper weight to an "employee's injury in fact" when determining if the harassment is actionable under Title VII.⁵⁹ When applying the subjective standard, courts have "acknowledged the different ways" plaintiffs may initially respond to or cope with harassment.⁶⁰ Some employees may quit their employment, while others may "experience a prolonged period of turmoil."⁶¹ Still others may "react angrily to the racial hostility, and may more easily be provoked into arguments or physical altercations with those co-workers responsible for the harassment."⁶² Generally, where employees demonstrate that unlawful racial abuse has gradually eroded self-esteem and adversely affected job performance, such showings have been sufficient to discharge the employee's burden under the subjective prong of the test for Title VII racial harassment claims.⁶³ However, recent statements by the Supreme Court concerning sexual harassment establish

ple in the Ku Klux Klan," the use of a racial epithet, and one arguably racial cartoon as "only two overtly racial remarks" occurring in eight years and therefore insufficient to be actionable because the comments were not pervasive).

56. *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (concluding that when evaluating the totality of the circumstances, "there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim").

57. *Id.* at 675.

58. *Id.* (citing *Robinson v. Jacksonville Shipyards, Inc.* 760 F. Supp. 1486, 1524 (M.D. Fla. 1991))("[A] holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes.").

59. *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1272 (7th Cir. 1991).

60. *Rodgers*, 12 F.3d at 676.

61. *Id.* at 677.

62. *Daniels*, 937 F.2d at 1272.

63. *Rodgers*, 12 F.3d at 677.

that actual demonstrations of psychological injury are not essential for establishing an employee's claim.⁶⁴

The Court reaffirmed that both the objective and subjective standards should be applied when evaluating the severity of the workplace harassment.⁶⁵ The Court set forth the factors appropriate for consideration: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance."⁶⁶

A final aspect for proving liability under Title VII involves establishing employer responsibility for the racial harassment. Imputing unlawful conduct to an employer becomes a particularly important element of a violation when the harassment stems from co-workers, e.g., teammates, or third parties in the workplace (fans or opposing players). Drawing from principles developed in cases involving sexual harassment claims, courts have rejected theories of strict liability for employer liability. Rather, courts have looked to traditional agency principles to determine employer liability. One such principle requires that the employer must have notice of the harassment. The Eighth Circuit, for example, has recently held that an employer is "liable only for events of which it knows or should have known . . . and with respect to which it fails to take corrective action."⁶⁷ When determining if an employer should have known about the racial harassment in the workplace, the courts have imposed a standard of "reasonable care" as a guide for considering whether an employer has exercised appropriate diligence in the workplace. Once notice of the harassment is established, agency concepts of ratification or

64. *Harris v. Forklift Sys., Inc.*, 510 S.Ct. 367, 370-71 (1993) (holding that the effect of the harassment on the employee's psychological well-being is relevant but like other factors is not required).

65. *Id.* at 370-71 (Mere utterance of an epithet that "engenders offensive feelings in [an] employee" is insufficient; rather, the work environment must be one that a reasonable person would find hostile or abusive; further, the employee must subjectively perceive the environment as abusive).

66. *Id.* at 371. Some courts enumerate particular elements or factors that plaintiff must demonstrate to prove a racial harassment claim. *See, e.g., Johnson v. Teamsters Local Union No. 559*, 1995 WL 355304 (D. Mass. 1995) ("[P]laintiff must prove: (i) that he is a member of a protected class; (ii) that he was subject to unwelcome racial harassment; (iii) that the harassment was based on race; (iv) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive working environment; and (v) that some basis for employer liability has been established"); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991) (discussing six and five multi-factor articulations by various courts of racial harassment claims).

67. *Jeffries v. Metro-Mark, Inc.*, 45 F.3d 258, 259 (8th Cir. 1995).

condonation and/or participation are examined to determine employer liability. Condonation of the harassment occurs if the employer does not take appropriate steps to halt or prevent the harassment. Where courts find that the employer took sufficient and appropriate steps to remedy the harassment, plaintiff's hostile environment claims will not succeed.⁶⁸ Participation will provide the requisite link for vicarious liability where the harassment is perpetrated by the employer's supervisors or agents.

IV. CONTRASTING TRADITIONAL AND CONTEMPORARY INDUSTRY PARADIGMS FOR ADDRESSING RACIALLY HOSTILE ENVIRONMENTS

Initially, the sports industry's response was to find "model citizen" athletes who would cope with the racially hostile environment. *Deference* was the only acceptable response. Nevertheless, most athletes adopted the deferential approach as a temporary strategy. As soon as they felt secure in their positions, they began to *protest* their hostile environments. The industry's response to protest was generally to enforce standards of *professionalism*. Protesting racial abuse had its costs, including fines, suspensions, bad press, and subsequent lack of endorsement revenues.

A. Model Citizen/Deference Paradigm

Traditionally, athletes have been expected to behave as model citizens, even when confronted with severe racial abuse. Under the *model citizen/deference* paradigm, athletes of color were expected to demonstrate not only kinesthetic genius; they were expected to display "multiple intelligences."⁶⁹ In particular, athletes were required to exhibit a type of intelligence that permitted extraordinary emotional control: control that suppressed retaliatory behaviors; control that left the athlete emotionally and spiritually intact even though experiencing racially abusive environments; control that converted anger and rage into performance enhancing energies; control that transformed assaults on dignity into opportunities that heightened self esteem.⁷⁰ While the model citi-

68. *Id.* at 261.

69. DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 38-39 (1995) (citing HOWARD GARDNER, FRAMES OF MIND (1983)) (contrasting the concept of a monolithic IQ view of academic intelligence, which includes verbal and mathematical-logical alacrity, with multiple intelligences, which include also spatial capacity, kinesthetic genius, interpersonal skills and intrapsychic capacity).

70. By assaults on dignity I mean the loss of even an *expectation* by early athletes that their rights to compete in a sport on an equal basis would be honored. For a discussion of

zen/deference paradigm may have included redemptive and conciliatory nonviolent resistance, it also frequently demanded self-deprecating passivity as the appropriate response to racial harassment.

Perhaps the model citizen/deference paradigm grew out of the earlier strategies imposed on Joe Louis and Jessie Owens. They were devised after white reactions to the reign of Jack Johnson, the first Black heavyweight champion,⁷¹ resulted in complete exclusion of Blacks from interracial competition. Owens⁷² and Louis⁷³ were expected to serve as "race ambassadors" so that Blacks might "win the admiration of the American public."⁷⁴ Branch Rickey's use of this strategy when integrating modern professional baseball was not surprising. The following exchange between Rickey and Robinson suggests Rickey knew that he would have to initially demand from Robinson exercise of the more noble and dignified aspects of the model citizen paradigm. During an intense three hour meeting at the beginning of the 1945 season, Rickey, who was known for his ability to coach each player according to his particular problems, offered Robinson passages from Giovanni Papini's *The Life of Christ*. He exhorted the virtues of nonresistance as a courageous rather than cowardly response to moral wrongdoing.⁷⁵ Concluding the exchange, Rickey resorted to physical challenge:

racism's attack on dignity, see BERNARD R. BOXILL, *BLACKS AND SOCIAL JUSTICE* 186-87 (1984)(quoting A.I. Melden's discussion of dignity: "What we label the dignity of a person is not a matter pertaining to some precious internal quality of his nature as a human being—his rationality or his autonomy—but that sense he displays of . . . the *expectation* that his rights will be honored.")

71. Othello Harris, *Muhammad Ali and the Revolt of the Black Athlete*, in MUHAMMAD ALI, *THE PEOPLE'S CHAMP* 56 (Elliot J. Gorn ed. 1995) (explaining how Johnson's victories over white boxers had so infuriated whites that race riots occurred; how Johnson's betrothal to a white woman resulted in the passage of antimiscegenation laws in some states; and after a white boxer, Willard, regained the title, whites were careful to prevent another African-American like Johnson from regaining the title and, therefore, for two decades barred Black boxers from competing for the title).

72. *Id.* at 56 (explaining how the mayor of Cleveland, Harold H. Burton, declared that at a party in Owens' honor after winning four gold medals in Berlin that by "his high character, his clean living and attention to duty," Owens had brought "credit and honor to his Race.").

73. *Id.* at 56 (noting that Louis had been instructed that he should not behave like Johnson and citing as an example a letter sent to Louis from the governor of Michigan admonishing him to remember that his "race, at times in the past, has been represented by others who thought they had reached the heights" and that he had in his "strong hands the job of representative-at-large of your people.").

74. *Id.* at 56 (concluding that "[t]he black athlete of this era was expected to be humble, obsequious, nonthreatening, and tolerant of demeaning stereotypes and characterizations.").

75. JOHN J. MONTELEONE, *BRANCH RICKEY'S LITTLE BLUE BOOK* 81 (1995). Rickey read the following passage to Robinson:

Rickey turned to Robinson and asked, 'Now, can you do it? I know you are naturally combative. But for three years—three years—you will have to do it the only way it can be done. Three years—can you do it?'

'What will you do,' Rickey shouted, 'what will you do when they call you a black son of a bitch? When they not only turn you down for a hotel room but also curse you out?' Rickey was on his feet—pacing and sweating. He sat down then quickly got up again and went over to Robinson. Robinson was tense, his fists clenched. Suddenly Rickey threw his own fist into Robinson's face, 'WHAT DO YOU DO?' he screamed.

Robinson whispered, 'Mr. Rickey, I've got two cheeks. If you want to take this gamble, I'll promise you there will be no incidents.'⁷⁶

From this exchange it is apparent that when confronted with racial harassment, the only acceptable response for the Black model citizen athlete was the exercise of nonresistance.

You have heard that it hath been said, An eye for an eye and a tooth for a tooth: But I say unto you that ye resist not evil: But whosoever shall smite thee on the right cheek, turn to him the other. . . . There are three answers men can make to violence: revenge, flight, turning the other cheek. The first is the barbarous principle of retaliation. Flight is not better than retaliation. The man who takes flight invites pursuit. Turning the other cheek means not receiving the second blow. It means cutting the chains of the inevitable wrongs at the first link. Your adversary is ready for anything but this . . . Every man has an obscure respect for courage in others, especially if it is moral courage, the rarest and most difficult sort of bravery. It makes the very brute understand that this man is more than a man. The results of nonresistance, even if they are not always perfect, are certainly superior to resistance or flight. To answer blows with blows, evil deed with evil deeds, is to meet the attacker on his own ground, to proclaim oneself as low as he. Only he who has conquered himself can conquer his enemies.

Id. at 81. While the sequence of this discussion differs from Jackie Robinson's account of the events, which included more elaboration from Rickey regarding the type of racial abuse Robinson would face, the substance of the discussion is essentially the same. ROBINSON, *supra* note 3, at 31-34.

76. MONTELEONE, *supra* note 75, at 81. Rickey was clearly not the first to use Biblical scripture as evidence that African Americans should accept without protest racial injustice. FORREST G. WOOD, *THE ARROGANCE OF FAITH* 43-46, 68-69 (1990) (explaining how white southern ministers used Biblical scripture to justify slavery; noting that "[i]n 1835, Episcopal Bishop Nathaniel Bower circulated a pastoral letter in South Carolina that listed ten biblical references 'relating especially to servants' with instructions to include them in any service for slaves."; observing that northern white ministers also "cited I Timothy 6:1—'Let as many servants as are under the yoke count Their own masters worthy of all honor'—as 'an impregnable demonstration that *slaveholding is not in all cases and invariably, sinful.*'") (emphasis in original).

The model citizen athletes' strategies were limited.⁷⁷ He was neither privileged to retaliate, protest, or resort to self-help. His ability to perform within the confines of this limited strategy was considered evidence of superior intellect.⁷⁸ When one considers contemporary theories of emotional intelligence,⁷⁹ it becomes apparent that athletes of color have often exhibited exceptional emotional intelligence. While there were isolated attempts to alter the environment, management was generally neither predisposed⁸⁰ nor capable of changing the hostile environment. The strategy was to find emotional geniuses who could perform and endure in hostile environments. Years later, complaints from Black athletes would reveal that Robinson was not alone in being required to exercise higher standards of model citizenship than his white counterparts.⁸¹

At this point it seems important to distinguish between the passivity initially urged upon Black athletes and nonviolent resistance used in later civil rights protests. While some might equate the two, there is a distinction. There is a difference between nonviolent resistance that is *protest* and passivity induced by fear and coercion. One of the most well known practitioners of nonviolent protest, Dr. Martin Luther King, Jr., has explained that while the latter lowers dignity and self-esteem, leaving an internal violence in its wake, the former redeems human dignity because it protests the evil forces of injustice.⁸²

77. ROBINSON, *supra* note 3, at 32 (stating that Rickey informed him that they couldn't fight their way through the plan for integration of the major leagues; they had no army, no owners, no umpires, and very few newspapermen on their side along with many hostile fans: Robinson could win only if he could convince the world that he was a great ballplayer and a fine gentleman).

78. MONTELONE, *supra* note 75, at 81 (quoting Rickey's requirement for the first Black to integrate baseball).

79. See generally GOLEMAN, *supra* note 69, at 43 (defining emotional intelligence along five main domains which include: (1) knowing one's emotions (2) managing emotions (3) motivating oneself (4) recognizing emotions in others and (5) handling relationships).

80. Rickey did not want to be perceived as "holier than thou in the race field." MONTELONE, *supra* note 75, at 80.

81. Professional athletes are not the only ones required to adhere to higher standards. They are also imposed on amateur athletes. Dennis Brackin, *His play, not his race gets Carter noticed; MSU hockey star ignores stereotypes*, STAR TRIB., Nov. 25, 1994, at 1C (noting coach's acknowledgement that a Black player on Michigan State's hockey team heard racial remarks "every so often" but commenting that the player was a "pretty realistic young man, a real adult in terms of his behavior. He's just a class kid.")

82. MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE, THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 87-89, 96 (James M. Washington ed. 1986) (distinguishing nonviolent resistance grounded in faith that "the universe is on the side of justice" from stagnant passivity induced by cowardice; explaining that the former strategy does resist and protest the forces of evil through active mental, emotional, and spiritual aggression).

Accounts of Black athletes disclose that they often experienced an internal violence which accompanied their inability to protest.⁸³ Their only means of reconciling inaction to blatant racial abuse was the belief that they carried on their shoulders the future prospects of an entire race for participation in interracial competition.⁸⁴ They carried these loads alone, and the prices they paid were substantial.⁸⁵ Accounts of their suffering are not unlike the emotional pain and physical suffering for which Title VII would now compensate victims of unlawful harassment.⁸⁶

B. Professionalism/Protest Paradigm

The concept of professionalism in sports has racially tinged meanings. The "culture of professionalism" that emerged during the late nineteenth-century in America was in part responsible for the exclusion of Black athletes from interracial competition.⁸⁷ While current standards of professionalism no longer require racial exclusion, enforcement of professional standards has been used to punish Black athletes for protesting racial injustice. Where African-American athletes are expected to endure and defer to racially hostile environments without protest, standards of *professionalism* become a metaphor for condoning unlawful racist activity.

83. ROBINSON, *supra* note 3, at 79 (explaining how he has stored up a "lot of hostility," was "keyed up because I hadn't been able to speak out when I wanted to," and as a result went home to his wife and child tense and irritable).

84. *Id.* at 60, 63 (describing his disgust with having to cultivate an image that he was a "patient freak" in the face of racial abuse from the Phillies, but regaining his sense of purpose and making a "lonely decision" not to retaliate; describing his feelings after "bowing to humiliations," such as appearing publicly and shaking hands with Chapman, the team manager of the Phillies who encouraged the racial abuse).

85. MONTELONE, *supra* note 75, at 81 (Robinson and other athletes like him were left to "carry the load" and assume the "responsibilities of himself to his race").

86. Jackie Robinson reflected on reactions to taunts, jeers, and ridicule he received in Baltimore, Louisville, and Syracuse during his minor league tour stops:

The toll that incidents like these took was greater than I realized. I was overestimating my stamina and underestimating the beating I was taking. I couldn't sleep and often I couldn't eat. Rachel was worried, and we sought the advice of a doctor who was afraid I was going to have a nervous breakdown. He advised me to take a brief rest.

ROBINSON, *supra* note 3, at 50. *C.f.* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2340 (1989) (describing "the physiological symptoms of racial harassment to include difficulty in breathing, rapid pulse rate, post-traumatic stress disorder, hypertension, alcoholism and suicide"; describing the "psychological effects . . . as includ[ing] headaches, social withdrawal, chronic depression, anxiety neurosis, and displaced aggression.").

87. TYGIEL, *supra* note 4, at 14 (attributing white athletes' antipathy for interracial competition to a "culture of professionalism" that used racial and ethnic barriers to entry into different occupations as a means of defining the "distinctiveness of a given profession").

The emergence of *protest* as a response to racial injustice is associated with the Civil Rights movement. Professor Derrick Bell offers a more personal reason than environmental influences. He concludes that "[p]rotest can rescue self-esteem" from the ravages of acts of overt discrimination and unconscious acts which threaten the well being and mental health of Black Americans.⁸⁸ While a number of Black athletes adopted protest as their response to racial injustice,⁸⁹ Muhammad Ali became a symbol of protest. As one of the first to confront racial injustice, Ali paid a high price.⁹⁰ His courage, however, led the way for society to accept protest from other Black athletes.⁹¹

When one considers the reasons why formerly non-confrontational athletes adopted protest as a means of pursuing racial justice, Professor Bell's explanation provides a means for better understanding the dynamics of hostile environments. Racial abuse by fans injures both dignity and self-esteem.⁹² Self-esteem must be redeemed. Where employers have effective systems of complaint or redress for fan racial abuse, then the complaint process becomes an acceptable means of channeling protest energies. Where fans are not reprimanded and abuse is allowed to persist, then self-help becomes the only limited strategy available for

88. DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* x (1994).

89. Kenny Moore, *The Black Athlete Revisited*, SPORTS ILLUS., Aug. 12, 1991, at 60 (describing the protest of Tommie Smith and John Carlos at the 1968 Mexico City Olympics and relating how they not only lost business opportunities but received death threats; noting that while the Black U.S. women were excluded from the men's deliberations over the boycott and the gesture, Wyomia Tyus, nevertheless ignored the slight and dedicated her gold medal to Smith and Carlos); AARON, *supra* note 17, at 187 (describing an interview he gave to a reporter from *Jet* magazine when he was angry, which protested the "ways in which baseball discriminated against black players—in salary, longevity, managing, the front office, everything"); ROBINSON, *supra* note 3, at 142 (describing the reputation he had developed because of his "fiery temper" against violation of [his] personal dignity and the civil rights of [his] people").

90. Harris, *supra* note 71, at 64 (noting that Ali lost his heavyweight title, was expelled for three and one-half years from professional boxing and forfeited a movie, record, and product endorsement contracts).

91. *Id.* at 65, 66 (noting Arthur Ashe's acknowledgement of the influence of Ali's protest on the support given to the 1968 Boycott of the Mexico City Olympics; quoting Kareem Abdul-Jabbar's acknowledgement of the influence of Ali on the public's later acceptance of his conversion to the Nation of Islam).

92. For example, consider the remarks of Bryan Cox revealing the extent his dignity was assaulted by racial abuse from fans during the September 1993 Dolphins-Bills game. "I don't care if the fans holler . . . or that they hate me," Cox said. "But when you call me racial names you crossed the line and it becomes about my manhood. You can hate me, but you must respect me." Gene Warner, *NFL Policy Aims to Curb Verbal Abuse of Players*, BUFFALO NEWS, July 31, 1994, at Local.

protest. Recent accounts indicate that self-help responses often escalate verbal encounters between athletes to physical ones.⁹³

Consider how professionalism factored into the National Football League's (NFL) decision to sanction Bryan Cox. Initially, the NFL used professionalism to justify its refusal to even consider Brian Cox's complaints of racial abuse by the Buffalo Bills fans as a mitigating circumstance for his behavior towards the Bills' fans. When responding to Cox's assertions that he was provoked by the Bills' fans, Commissioner Paul Tagliabue stated that "[d]espite what you may consider provocation from Buffalo fans, it is the responsibility of professionals not to lose their composure in such circumstances."⁹⁴ In a letter setting forth his decision, Tagliabue explained to Cox that he had been previously notified that "obscenities and other behavior that [was] considered excessively unprofessional or in extremely bad taste would warrant disciplinary action"⁹⁵ While Cox admitted the impropriety of his behavior, he maintained that the League should have considered the circumstances surrounding his conduct when imposing discipline.⁹⁶

Later, in response to Cox's appeal and after he filed a suit alleging that the NFL condoned the fans' racial harassment, the NFL used standards of professionalism to primarily place responsibility for creating the hostile environment on Cox. Commissioner Tagliabue considered the racial harassment and examined Cox's behavior in "a different and more

93. Bill Campbell, *MSU Player Accuse Two Tigers of Using Racial Slurs*, NEW ORLEANS TIMES-PICAYUNE, Dec. 10, 1995, at D1 (reporting how a Black player, Yakini Allen from Michigan State, accused a white player of using a racial epithet and reacted by grabbing his face mask); *NBA Punishes Maxwell in Excess of \$200,000*, PORTLAND OREGONIAN, Feb. 9, 1995, at D1 (reporting how Maxwell received one of the harshest penalties in sports history after he punched a fan during the third quarter of a game; Maxwell arguing that there were mitigating circumstances and asserting that the fan was yelling racial and sexual epithets); Michael A Lutz, *Maxwell to Appeal Suspension, Fine*, PORTLAND OREGONIAN, Feb. 10, 1995, at E06 (reporting that Maxwell claimed that he restrained himself until the fan started making references to his daughter who died in Oct. 1993; Maxwell also stating that "[s]ome reasonable guideline for appropriate fan conduct needs to be adopted"; fan denying directing any racial or profane remarks to Maxwell); Carrie Kirby & Bob Helbig, *Former Packer may face charges*, MILW. J. SENT., Oct. 19, 1995, at B1, B4 (Reporting explanation offered by former Green Bay Packer and Black player, Ken Stills, that he kicked a white opponent in the head during a city league football game because he was provoked by a racial remark).

94. Letter from Commissioner Paul Tagliabue to Mr. Bryan Cox dated Sept. 29, 1993 (copy on file with Marquette Sports Law Journal).

95. *Id.* (referring to a training-camp playbook memo sent to all NFL players regarding game-related discipline).

96. Brief in Support of the Appeal of Bryan Cox, Submitted by Michael S. Baird, Attorney for Bryan Cox, at 5 (copy on file with Marquette Sports Law Journal).

understandable light," reducing the fine to \$3,000.⁹⁷ Nevertheless, when doing so he reiterated that Cox's pre-game comments, while not containing racial invectives, provoked the Buffalo fans. Therefore, "[i]t [was], ultimately, the responsibility of professionals to maintain self-control in difficult and hostile circumstances."⁹⁸ Standards of professionalism were again used to shift responsibility for providing an environment free of racial harassment from the employer to the athlete player. Only after further complaints from Cox did the League require member clubs to take "additional steps . . . to minimize the risk of physical or verbal threats, harassment (including racial taunts) and confrontation between fans and club personnel (especially players and coaches)."⁹⁹ The clubs were required to "[t]ake appropriate measures, including removal from the stadium, if any fan engages in physical or extreme verbal abuse of club personnel or game officials (e.g. racial taunts, profane signs or banners, and the throwing of dangerous objects)."¹⁰⁰

I do not mean to suggest that Title VII's prohibitions against racial harassment prevent employers from disciplining employees for misconduct or privilege employees to respond with misconduct. On the contrary, courts recognize that employers may address employee misconduct even when perpetrated in response to racial harassment.¹⁰¹ When professionalism instead of sustained, conscientious, and reasonable measures to eliminate racial abuse from sporting events becomes the industry's only response to racial harassment, that approach runs afoul of Title VII.

97. Letter from Commissioner Paul Tagliabue dated Apr. 15, 1994 (copy on file with Marquette Sports Law Journal).

98. *Id.*

99. Memorandum from Commissioner Tagliabue to Club Presidents & General Managers dated July 28, 1994 (hereinafter Memorandum)(copy on file with Marquette Sports Law Journal); Letter from Michael S. Baird to Judge Shira A. Scheindlin dated February 15, 1995 (copy on file with Marquette Sports Law Journal).

100. Memorandum, *supra* note 99, at 2 (Security policy).

101. *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1009, 1012 (9th Cir. 1983) (concluding that "[u]nreasonably hostile or aggressive" opposition to protected activity may provide a legitimate, nondiscriminatory basis for an employer's decision; opposition to discrimination is unreasonable when it significantly disrupts the workplace or directly hinders employee job performance); *Folkerson v. Circus Circus Enter.*, 68 F.3d 480 (9th Cir. Nev.) (Unpublished Disposition) (reversing summary judgement granted for the defendant employer based on contentions that female employee was engaging in unprotected oppositional conduct when she struck a customer in response to his attempt to sexually harass her).

IV. A RACIALLY HOSTILE ENVIRONMENT PERSISTS AND MORE CAN BE DONE TO ELIMINATE IT

Existing civil rights laws prohibiting discrimination in employment require that employers take reasonable steps to eliminate racial harassment in the workplace. While sports employers, like other employers, are not directly responsible for the behavior of third parties, e.g., fans and spectators, they are nevertheless required to eliminate racial harassment in the workplaces of their professional athletes.¹⁰² In particular policies requiring ejection of fans, seating of fans, revocation of season tickets, controlling consumption of alcohol, and revision of league rules, if necessary, should be explored to improve this environment.

Where the taunts are not obviously racial but disparately based on race, the motivations of third parties will be difficult to establish. Other concerns are raised because frequently white and Black athletes are subject to fan harassment. How can the sports industry determine when or if harassment is motivated by racial animus, behavior on the part of the athlete, or simply fan displeasure with the athlete or the team with which he or she is associated?

While these concerns are legitimate, they can be addressed. Decisions of courts resolving Title VII harassment claims suggest that other employers must address these issues. Courts recognize that the use of race-based strategies to accomplish even non racial goals will nevertheless violate the statutory proscription.¹⁰³ Employers are expected to investigate and determine the reasonable inferences which should be drawn about the motivations of perpetrators of neutral but obnoxious behaviors.¹⁰⁴ Likewise, the fact that racial discrimination is provoked by an employee does not cleanse the harassment of its illegality. To suggest

102. *C.f.* *Magnuson v. Peak Technical Serv., Inc.*, 808 F. Supp. 500, 512-13 (E.D. Va. 1992) (applying EEOC guidelines holding that an employer may be responsible for sexual harassment acts of nonemployees); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1027 (D.C. Nev. 1992)) (holding that an employer may be responsible for the sexual harassment by non-employees when the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action; noting the EEOC will "consider the extent of the employer's control and any other legal responsibility the employer may have with respect to conduct of such non-employees").

103. *See, e.g.,* *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (rejecting employer's arguments that supervisor's racial insults about the intelligence of all black men should be thought of as a "motivational technique" and concluding that Title VII does not permit "this type of blanket criticism of the intelligence of a racially-defined class of employees as a motivational technique").

104. *Id.* at 676 (upholding district court's conclusion that an otherwise race neutral derogatory statement about people from Arkansas was nevertheless a racial slur; concluding that lower court's characterization was plausible and within permissible views of the evidence).

that certain behaviors by athletes provoke justifiable racial harassment, particularly from third parties, essentially advocates for employer and societal condonation of racial harassment. However, the law has privileged only certain types of reasonable responses to employee misconduct—racial harassment by third parties has not and should not be one of them.

When assessing the obligations of sports industry employers to address racially harassing behaviors, consideration must be given to the public nature of the harassment. The very public nature of racial harassment by fans “creates a domino effect of anguish and anger” that ripples across communities.¹⁰⁵ When fans are allowed to persist in creating racially hostile environments, their harassment becomes more than simply personal encounters with the athletes. Their insults permeate to entire Black communities. While the public nature of sports employment makes prevention of racially abusive behaviors difficult for the sports industry, the very public nature of the harms caused by racial harassment from sports fans demands even greater degrees of diligence and higher levels of responsibility.

While employment discrimination laws protect the athlete from racially abusive behaviors in the workplace, racial harassment at sporting events not only harms athletes but also the Black fans who attend sporting events or witness the harassment. Where Black fans have not provoked such behaviors, provocation by the athlete does not even begin to justify their subjection to racial harassment. The sports industry has developed methods for identifying and sanctioning intentional and flagrant fouls, unnecessary roughness, and various types of fan misconduct;¹⁰⁶ the

105. FEAGIN & SIKES, *supra* note 13, at 16 (explaining how the “cumulative impact on an individual of repeated personal encounters with racial hostility is greater than the sum of these encounters” and the sharing of these accounts “creates a domino effect”).

106. *Snowball Hurling Fan Says He’s A Scapegoat*, CHARLESTON DAILY MAIL, Dec. 29, 1995, at 03B (noting that the Giants and the New Jersey Sports and Exposition Authority offered \$1,000 for information leading to the identification of a fan throwing snowballs during the Giants game after his photograph appeared in area papers; also noting that 175 fans were ejected and 15 arrested and the fans nearly caused a game forfeit); Williams F. Nicholson, *Ice-pelting controversy snowballs*, USA TODAY, Dec. 27, 1995, at 1A (reporting that the Giants “seek to revoke tickets of the mystery hurler in the widely published photo — and of others they can ID from videotapes and photos”); *Rowdy fans had a snowball’s chance; Security tightened, alcohol banned after Giants debacle*, STAR TRIB., Dec. 25, 1995, at 2C (quoting Robert Mulcahy, Chairman of the New Jersey Sports & Exposition Authority, as stating that “[w]e’re just not going to take that kind of behavior anymore”; “[w]e have a judge and some lawyers at the stadium and anyone caught will be arrested and arraigned right here”; “no alcohol was sold during the game and security was beefed up”).

industry can likewise develop a means to clean up racially polluted environments.¹⁰⁷

107. Consider the following suggestions that have been offered to address racial harassment by sports fans: *Stop Racist Behavior—NOW* Wis. Sr. J., Oct. 6, 1994, at 15A (citing to racial incidents at local high school sports events in Texas and Wisconsin that were provoked by name-calling by players and concluding that “forfeiting a game, or attending mandatory sensitivity training does not seem harsh punishment”).